Supreme Court, U.S.
FILED
OCT 26 1998
CLERK

(24)

No. 97-1337

In the

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA; Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS; et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF JOHN W. THOMPSON, JENNY THOMPSON, JOSEPH N. KARPEN, LEROY BURLING, GLENN THOMPSON, GARY M. KIEDROWSKI, MICHAEL SHEFF AND ROBERT L. EDMONDS IN SUPPORT OF PETITIONERS

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1998 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

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SUMMARY OF REPLY ARGUMENT

These Landowners intervened in this action as representatives of individuals who own lands and businesses in the twelve county Minnesota portion of the 1837 ceded territory, and who are the intended beneficiaries of the 1837 and 1855 treaty cessions, and the Executive Order revoking the privilege.

The Briefs by the Chippewa Bands and the United States attempt to rewrite a straightforward history in which the Chippewa ceded land and reserved a temporary privilege to hunt, fish and gather wild rice during the pleasure of the President. That temporary privilege was revoked by Presidential Order, relinquished by the 1855 treaty, and terminated by Minnesota's admission to the Union. The multiplicity of facts and novelty of arguments advanced by the Bands are compelled by the lack of a single, compelling argument from the plain language of the controlling documents.[1] Contained within 2,000 pages of the Appendix before this Court are excerpts from hundreds of pages of Band expert reports, including: a linguist's report on the likely translation of treaty language, without any record of the translation[2]; and a law professor, testifying as a

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[1] To write around the plain language of these documents, the Chippewa Bands and the United States have filed 204 pages of briefs in support of 481 pages of lower court decisions. Surely, nothing should be so complex to explain a thirty-eight word (one sentence) 1837 privilege, a one half page Presidential Order revoking the privilege, and the single sentence language of cession from the 1855 treaty (PA 486, 565, 503).

References to "**PA**" are citations to the Appendix which was filed with the State of Minnesota's Petition. "**JA**" refers to the Joint Appendix. "**LA**" refers to the Landowners' Appendix filed at the Eighth Circuit.

[2] The linchpin to the Bands' entire case is the conjecture of a linguist who is not fluent in Ojibwe (JA 1168) and admittedly not qualified to be an interpreter himself (JA 1194). The linguist Nichols speculated that the most likely translation of the treaties would have been an attempt at a direct word-for-word equivalent even though there is no record of what Ojibwe terms were used during the 1837 or 1855 treaty negotiations (JA 1169). Nichols admitted many translations other than a word-for-word

"wildlife law" expert, who claims that the drafters of the 1837 treaty created a privilege unknown to the common law (JA 1208).

The Landowners submit that if the Court looks beyond the plain, unambiguous language of the 1837 treaty, that examination must begin with the Treaty Journal (JA 45-93). If the Treaty Journal, and the subsequent federal action taken pursuant to the treaty, are consistent with the language of the treaty, judicial inquiry is at an end. The Chippewa were told at the 1837 treaty negotiations that they would be "permitted" and "allowed" during the President's pleasure to hunt and fish on the ceded lands. It would "probably be many years, before your Great Father will want[3] all these lands for the use of his White Children." (JA 78). Thirteen years later, acting pursuant to the power expressly delegated by Congress in the treaty, President Taylor revoked the privilege. Thus, the 1837 treaty, the 1837 Journal, and the actions of the President, are consistent with each other.

The exclusive forum for perceived injustice from an Indian understanding that differs from the plain language of the treaty was the Indian Claims Commission. 60 Stat. 1049 (1946) (PA 550-564; see LA 1005-1033); see also, Landowners' (Thompson et al.) Opening Brief, pp. 13-14; Catawba Indian Tribe of South Carolina v. United States, 982 F.2d 1564, 1568-69 (Fed. Cir. 1993). The Indian Claims Commission determined that damages were the sole remedy, not an injunction that voids a

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attempt were possible (JA 1187), since some of the interpreters were probably fluently bilingual in English and Ojibwe and knew the language better than the linguist (JA 1189). The linguist admitted that if any of these interpreters had attempted to translate the meanings and concepts of the treaties rather than just direct word-to-word equivalents, the meanings and concepts could have been translated and understood by the Chippewa (LA 9491-92).

[3] The privilege would be revoked when the lands were wanted, the term used by the Treaty Journal, not when the President demonstrated a "need" for the lands as the Bands argue.

Presidential Order, undoing the settled rights of non-Chippewa citizens, the State of Minnesota, and its political subdivisions. See, Navajo Tribe of Indians v. State of New Mexico, 809 F.2d 1455, 1460-61, 1464-65, 1467 (CA10 1987). Consistent with the Constitution, a state simply cannot be deemed to have ceded its sovereignty by way of Indian understanding that allegedly differs from the plain, unambiguous language of the treaties, Executive Order, and the Enabling Act.

I. THE INDIAN CLAIMS COMMISSION ACT PRESENTS A JURISDICTIONAL BAR.

The United States argues that because it intervened in this action, the Indian Claims Commission Act (ICCA) is inapplicable to this suit because the Act only barred claims against the United States.

First, the claims barred by Section 12 are those made "on behalf of any Indian tribe. . ." (60 Stat. 1049, §2, PA 550). The United States admits that it has participated in this action "on behalf of the Bands." (U.S. Brief at p. 48, n. 24). An action on behalf of an Indian tribe is barred by the ICCA. Second, the United States fails to address the Landowners' argument that the Chippewa cannot create federal jurisdiction by suing the state to accomplish indirectly what they cannot accomplish directly -- negating an Executive Order through judicial action. The jurisdictional barrier, by its language, does not depend upon the alignment of the parties, but whether the suit challenges the actions of the United States. This action is precisely the type of attack on the actions of the federal government that were foreclosed by the ICCA in order to assure that the rights of all were settled with finality. Moreover, the remedy sought here is a remedy prohibited by the Indian Claims Commission, rescinding an Executive Order to reestablish a privilege. These Chippewa Bands were awarded nine million dollars for their 1837 treaty claims without setoff or reduction for any retained hunting and fishing privilege (PA 383). See, Oregon Dept. of

Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 773-74 (1985).

II. THE EXPRESS LANGUAGE OF CESSION FROM THE 1855 TREATY CEDED ANY HUNTING AND FISHING PRIVILEGE.

A. The Rum River Dam Incident Provides No Support for the Bands' 1855 Treaty Arguments.

The Mille Lacs Band and the United States argue that the 1855 Rum River incident, which occurred while the 1855 treaty negotiations were occurring, demonstrated that both the United States and the Indians believed that the 1837 treaty privilege still existed in 1855, despite President Taylor's 1850 Order revoking the privilege.

In 1849, lumbermen had built a dam on the Rum River near its source at Lake Mille Lacs which flooded the wild rice crops of the Mille Lacs Band. In a February, 1855 clash between the lumbermen and the Chippewa, three were killed (PA 269). In his **February 16, 1855 letter** Territorial Governor Gorman hastily writes:

> I embrace the earliest opportunity to inform you of a difficulty that has occurred. . .on the head of the Rum River. . .which has this day reached me. . .I have just this moment dispatched a messenger and interpreter to the Indian village. . .The lands occupied by the timbermen have been surveyed and sold by the United States and the Indians have no other treaty interests except hunting and fishing and I do not think that their land extends to the point at which our citizens are operating in the pineries, at least I am informed by the oldest citizens most familiar with the lines separating the Indian ~~community~~ country from the ceded lands, that our citizens are seven miles south of the extreme southern line of the Indian boundary.

(JA 295-96). An examination of Gorman's letter reveals the following:

(a) Gorman is wrong that the "lands occupied by the timbermen have been surveyed and sold by the United States." Land survey records demonstrate that by the end of 1854 the survey and subdivision of land, necessary for sale, was "far more than some seven miles from the Rum River." (Testimony of Historical Geographer Squires at JA 1412-14).

(b) Whether Gorman is even referring to the 1837 treaty is unclear. If Gorman had before him the 1837 treaty, he most certainly would have referred to its language in Article 5 providing the "privilege of hunting, fishing **and gathering the wild rice**. . .". (PA 486) (emphasis added). The letter's omission of the wild rice gathering privilege, when that was the heart of this dispute, demonstrates that Gorman was either not referring to the 1837 treaty, or was simply shooting from the hip.

Whatever value there is in this February, 1855 letter is undercut by what Governor Gorman writes four months later to Chief Little Hill on **June 4, 1855**.

> [The dam] is not on your land, and if it was, it was put there before you had any rights there except to hunt and fish.

(PA 271). **The dam was built in 1849**, and President Taylor's revocation Order was issued in 1850. Gorman's statement that when the dam was built the Indians had no rights there except to hunt and fish is consistent with privilege revocation.[4] Gorman

[4] The Mille Lacs Band, and the District Court, placed great reliance upon the Gorman letter as demonstrating that the 1837 privilege still

simply doesn't mention the 1850 Order of President Taylor, meaning that his view of the effectiveness of the Presidential Order is unknown as well as immaterial. The payment to the Chippewa to settle the wild rice loss in the summer of 1855 occurred because the wild rice beds were then in the newly created Mille Lacs Reservation (PA 271-72, n. 13).

B. The 1855 Treaty Negotiations and Language, and its Authorizing Act, Eliminate the Claim to a Special Hunting and Fishing Right by the Chippewa in Minnesota.

The Authorizing Act for the 1855 treaty provided that "whenever" lands were ceded "the same shall cease to be 'Indian Country'" and the "laws of the United States and the Territory of Minnesota" would be extended over "the Chippewa territory in Minnesota." 10 Stat. 598 (1854) (PA 533). Congress intended to end any claim of Chippewa sovereignty and control over lands in Minnesota.

While U.S. treaty negotiator Manypenny discusses a possible land claim of two Bands to the north and west of the 1855 cession, Manypenny leaves no doubt in his letter of transmittal to Secretary of the Interior McClelland that Article 1 of the 1855 treaty resolves far more than that claim:

> [The Chippewa Bands] cede and convey to the United States all of the lands owned and claimed by them in that Territory, and whatever right or interest they **may have** in other lands in common with other Indians there or elsewhere.

(JA 291-92) (emphasis added).

By eliminating all interests in or to lands of whatsoever nature, the 1855 treaty fulfilled the Authorizing Act's purpose. Whether or not revocation of the 1837 treaty privilege was specifically discussed in 1855 is beside the point. The 1855 treaty negotiations do not reflect any discussion or agreement to reestablish the privilege in light of the 1850 Order's revocation of the 1837 privilege[5]. Silence on this critical point is fatal to the claim that the privilege survived the express cession. Klamath, 473 U.S. at 768; see, Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, ____ U.S. ____, 118 S.Ct. 1904, 1910 (1998). A fair reading of these documents is that the Chippewa agreed their sovereignty would be reduced to the area of their new reservations. See, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335, n. 18 (1983) ("tribal sovereignty contains a 'significant geographical component'").

The Mille Lacs Band argues that they would have starved to death if the 1837 treaty privilege to hunt and fish off the reservation was lost before or after the 1855 treaty.[6] This argument does not explain how the Pillager and Lake

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existed at the time of the 1855 treaty negotiations, despite the obvious errors and inconsistencies in the February, 1855 letter. Contrast the reliance upon Gorman's letter with the standard applied to President Franklin Roosevelt's March 1, 1938 letter (PA 575) confirming that the 1850 Order revoked the 1837 privilege. President Roosevelt and numerous COIA letters (JA 1792; 1836; 1832; 1798; 1809-10) were dismissed because "there is no evidence that the authors had considered all of the background relevant to treaty interpretation." (PA 300).

[5] The 1851 telegram "suspended" removal, but no document revoked the 1850 Order or even attempted to suspend or cancel 1837 privilege revocation (JA 1054, 1113, 1121-22). That the Chippewa sent a delegation in June 1852 to Washington, D.C. to lobby President Fillmore to rescind the 1850 Order, and were unsuccessful (Driben, LA 2400), demonstrates a lack of "belief" the privilege had been restored.

[6] The United States argues that the Chippewa were assured during the 1854 negotiations that the reservations did not confine them and they had the privilege to go out and hunt whenever they had a mind to (United States Brief at p. 19). The problem with that argument is that it is the interpretation of the 1854 treaty negotiations advanced by the Chippewa nine years later at the 1863 Treaty Council (PA 274), and doesn't support the argument that the Indians could hunt without regard to state law. See, Statement of H. Rice to Mille Lacs Band (JA 471-72).

Winnibigoshish Bands, who lived on the Leech Lake Reservation (map at JA 1883) in the 1855 cession area, could have survived since no hunting and fishing privilege was preserved in 1855 for the off-reservation lands contiguous to their reservations. Compare, Klamath, 473 U.S. at 761. The Bands also ignore the annual payments and numerous items provided to assist them in agricultural pursuits (1854 Treaty, Art. 4 and 5, PA 493-94; 1855 Treaty Art. 3, 4 and 9, PA 506-13). Repeatedly, the Chippewa negotiators agreed that their future depended upon securing reservations, abandoning the old ways and embracing the methods of the American civilization that was engulfing them (PA 513; JA 302, 335, 338-39, 348, 349).

C. The 1855 Treaty Expressly Revoked the 1837 Treaty Privilege.

The Mille Lacs Band advances the argument that the express language of cession from the 1855 treaty is not an "express" abrogation of the 1837 privilege.[7] This argument rehashes the argument rejected in Klamath, that the express language of cession does not reach the hunting and fishing privilege unless it is specifically mentioned. Klamath, 473 U.S. at 770.

The Mille Lacs Band points to the Treaty with Chippewas of Sault Ste. Marie, 11 Stat. 631 (August 2, 1855), for the proposition that a subsequent treaty is required to specifically mention the previous treaty fishing provision in order to revoke it. The underlying June 16, 1820 treaty (7 Stat. 206) granted a "perpetual right of fishing at the falls of St. Marie's." Id. When negotiating the later treaty, Manypenny addressed this right specifically because that was the singular purpose of the later treaty.[8] The fact that on rare occasion subsequent treaties

[7] Mille Lacs Brief, p. 18.

[8] This example actually demonstrates why the broad cession language of the 1855 Chippewa Treaty (PA 503) didn't relinquish only the lands

specifically mentioned earlier treaty hunting and fishing rights when terminating those rights does not stand for the proposition that if those subsequent treaties had used the sweeping, express language of cession, the result would not have been the same.

The Mille Lacs Band is forced to concede that the 1855 treaty language before this Court does "encompass" the 1837 hunting and fishing privilege if "the 1837 privilege is a 'right to' or 'interest in' lands." (Mille Lacs Brief at p. 21). This concession demonstrates that all of the Band's 1855 treaty arguments are unavailing unless the 1837 privilege can be reclassified as something other than an interest in or to lands.

D. Reclassification of the 1837 Privilege from a Property Interest to a Regulatory Right or Federal Hunting Permit Must Fail.

The argument that a hunting or fishing privilege constitutes a regulatory right separate from an interest in or to land has been rejected by this Court's decisions in Klamath, 473 U.S. at 774 and Kennedy v. Becker, 241 U.S. 556, 562 (1916) (See, Landowners' Opening Brief, pp. 33-35). If a hunting and fishing right or privilege has nothing to do with interests in or to land, there was no need to preserve those interests at the time of land cession. Klamath stands for the clear proposition that a land cession eliminates lesser included interests, including hunting and fishing privileges, unless expressly reserved at the time of the cession.

The Mille Lacs Band is reduced to arguing that even though the 1855 treaty eliminates "any and all right, title, and interest, **of whatsoever nature the same may be**. . .in and to" the lands (PA 503), that language does not "extinguish 'interests related to lands' or 'rights which may be exercised within a particular geographic area.'" (Mille Lacs Brief at p. 24). This sweeping

north and west of the 1855 cession area. If that was the only goal Manypenny would have used a specific description as he did at Sault Ste. Marie.

language of cession is sufficient to eliminate all interests regardless of how the language is parsed.

The Mille Lacs Band, citing to Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), suggests that the 1837 privilege is more like a federally issued hunting and fishing license, not a real property license. The Bands claim to have obtained a "federal hunting and fishing permit" which is "independent of any interests in land" but which "preempt inconsistent state regulations." (Mille Lacs Brief at pp. 22-23).[9] A hunting and fishing permit, far from preempting, is specifically issued subject to the state's police powers. Douglas is contrary to the Band's argument, holding "a federal license. . .does not immunize [against]. . .the normal incidents of local police power" and "federal licensees are 'entitled' to the same 'privileges' of fishery access as a State affords to its residents or citizens." Id., 431 U.S. at 278, 281, quoting Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 447 (1960) and Act of Dec. 31, 1792, 1 Stat. 287, codified in 46 U.S.C., c.2, § 251. The Mille Lacs Band's argument reveals its true nature: it is the repackaged "regulatory right" argument from the Klamath Tribe's brief[10] (JA 1859; Landowners' Opening Brief at pp. 33-34). Ultimately, this approach would undo a century of Indian

[9] The Band uses the example of "the right, in common with the citizens of the United States, to travel upon all public highways" to show no interest in or to land. (Mille Lacs Brief, p. 23-24). Actually, this "right" would be in the nature of a license or easement. But the example is more telling in unintended ways. The Band surely could not "self-regulate" its members' public highway activities under a different highway code, or claim a federal highway "permit," preempting state traffic laws. Non-exclusive, off-reservation hunting and fishing privileges, like other privileges in common with citizens, create no interests greater than citizens and are fully subject to all state regulations.

[10] Alternatively, the Mille Lacs Band's claim must be that Indian sovereignty was relinquished to obtain a previously unknown federal hunting and fishing permit that preempts state police power under the Commerce Clause contrary to Douglas v. Seacoast Products. See, Section III.A, p. 13, infra.

law. United States v. Winans, 198 U.S. 371 (1905) holds reserved usufructuary rights to be interests in or to land. Menominee Indian Tribe of Wisconsin v. Thompson, 943 F.Supp. 999, 1018 (W.D. Wis. 1996); see also, Kennedy v. Becker, 241 U.S. at 562; State v. Mallory, 83 S.W. 955, 959 (Ark. 1904).[11] If the 1837 privilege was granted subject to federal control, in the nature of a hunting and fishing permit, then the power to regulate that hunting and fishing activity passed to the State of Minnesota upon statehood.

As a privilege to hunt and fish upon ceded lands, the privilege was valuable because it gave non-citizen Indians the same privilege to hunt and fish as citizens (JA 1211-12). This temporary privilege was never intended to be free from equal state regulation, because it would have given the Indians greater rights than U.S. citizens, the intended beneficiaries of the United States land purchase. This result was inconceivable. (JA 1445-46). The United States concedes that as a practical matter the "1837 Treaty did not provide the Chippewa with any greater rights, in 1837 or in 1855, than were possessed by non-Indian residents of the ceded territory." (U.S. Brief at p. 29). Meanwhile, the Chippewa argue that the privilege provides "special" rights. (Mille Lacs Brief, p. 26). This Court should return to its holding in Kennedy v. Becker that a privilege to hunt and fish is non-exclusive and subject to state regulations applicable to all citizens. Whether denominated a profit a

[11] The argument that the privilege creates something other than an interest in or to land was advanced by "wildlife law" expert Dr. Thomas Lund who claimed that the 1837 privilege created something unknown to the common law (JA 1208). The privilege was subject to state trespass law, but Lund could not explain why it was subject to one state law but not any others (JA 1200-01). Dr. Lund admitted that a monopoly to harvest fish or game is an interest in land, unlike the 1837 privilege, but claimed that giving the privilege prevented the granting of a monopoly (JA 1201-03). Not only was Lund's argument advanced to this Court in support of the Klamath Tribe's claim of a "regulatory right" (JA 1853; 1859) and rejected by this Court, but it has been rejected as a "fallacy" in Menominee Indian Tribe, 943 F.Supp. at 1018.

prendre or a revocable license, the 1837 privilege was an interest in or to land which did not survive the 1855 treaty.

III. THE CHIPPEWAS' CLAIM IS BARRED BY MINNESOTA'S ENABLING ACT, THE EQUAL FOOTING DOCTRINE, THE TENTH AMENDMENT AND FEDERALISM.

A. There is No Valid Constitutional Basis for a Broad Federal Grant of Immunity from Minnesota's Police Powers.

The Supremacy Clause (U.S. Const., Art. VI, cl. 2) does not authorize all limitations on state sovereignty arising from a treaty. The Supremacy Clause poses the question of whether an exemption from future state law in a treaty is validly issued "under the Authority of the United States" (Art. VI, cl. 2) in light of competing constitutional concerns.[12] The Bands contend that the Property Clause (Art. IV, §3, cl. 2), or decisions[13] relying upon the Commerce Clause (Art. I, §8, cl. 3) supply the requisite constitutional authority for the United States to "convey an exemption. . ." and "its ability to regulate" (PA 333-4).

The Property Clause only authorizes Congress to "impose laws upon them [territories]. . . so long as they remain in territorial condition."[14] In 1837 and 1858 Congress intended[15] that any "exemption from regulation" (PA 333-34) flowing from the 1837 treaty privilege would end upon statehood. While the Property Clause may now allow Congress "to protect wildlife on the public [federal] lands"[16] in the face of state law allowing the slaughter of certain federally protected animals (Kleppe at 545), it does not afford Congress the power to immunize Band members from the application of Minnesota's nondiscriminatory state hunting and fishing laws regarding the harvest of all species.

Hughes held that when regulating fish and game a state could not constitutionally forbid the export of minnows from Oklahoma because of the impact on interstate commerce. The Commerce Clause is irrelevant to this action because it does not, and cannot, serve to limit a state's police power regarding intrastate activities including: manner of harvest, management of the species, seasons, limits, and safety regulations at issue.

In Johnson, the Court upheld federal laws regulating the liquor trade with Indians against conflicting Minnesota law for two key reasons. The first was because, "[t]he state has no police power over Indian commerce." Johnson, 234 U.S. at 430. The second was due to Art. VII of the 1855 treaty, 10 Stat. 1165 (PA 512) which provides that federal liquor laws which "have been or may be enacted. . .shall continue and be in force. . .until otherwise provided by Congress." 10 Stat. 1165 (as cited in, Johnson, 234 U.S. at 435).[17] In contrast, the state regulations at

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[12] The equal footing issue was properly before and considered by the Circuit Court as to all Bands (PA 52, n. 40).

[13] Hughes v. Oklahoma, 441 U.S. 322 (1979); Johnson v. Gearlds, 234 U.S. 422 (1913); United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876); Perrin v. United States, 232 U.S. 478 (1914).

[14] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845) (as cited in, Utah Div. of State Lands v. United States, 482 U.S. 193, 196-7 (1987)). The power to regulate territorial lands is temporary and expires on statehood. Shively v. Bowlby, 152 U.S. 1, 57-58 (1894); see, Pollard's, 44 U.S. at 221, 223-25; American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 542 (1828); United States v. Winans, 198 U.S. 371, 378 (1905).

[15] The United States acknowledges that the "touchstone" of the test under Ward v. Race Horse, 163 U.S. 504 (1896) is "the intent of the Congress" (U.S. 42). The only testimony in this case regarding Congress' intent, is that Congress never would have intended for the Chippewa Band members to hold hunting and fishing privileges superior to those of American citizens (JA 1445-46).

[16] Kleppe v. New Mexico, 426 U.S. 529, 546 (1976).

[17] The preemptive power of U.S. Const., Art. I, §8, cl. 3 was at its zenith in Johnson. The "federal statute forbidding the introduction of

issue here fall squarely within police powers and do not concern commerce with the Chippewa. In addition, there is no plain statement in the 1837 treaty that the hunting and fishing privilege would continue until a subsequent affirmative act by Congress.

B. Minnesota's Sovereignty Was Not Explicitly Abrogated.

The Bands characterize the issue as whether silence regarding hunting and fishing "rights" in Minnesota's Enabling Act, 11 Stat. 285 (PA 515) impliedly abrogated the 1837 treaty privilege.[18] The crucial issue is whether silence in the Enabling Act regarding any limits on Minnesota's sovereignty impliedly abrogated or constrained Minnesota's police powers in violation of the Tenth Amendment. Sovereign power is to "remain intact unless surrendered in unmistakable terms." Bowen v. Public Agencies Opposed to Social Security, 477 U.S. 41, 52 (1986) (citing, Merrion v. Jicarillo Apache Tribe, 455 U.S. 130, 148 (1982)). The Bands cannot meet their burden of demonstrating

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intoxicants into the Indian country, was one demanded by the highest considerations of public policy. . ." Dick v. United States, 208 U.S. 340, 354 (1908). In Forty-three Gallons, the Court recognized that the test to determine if the state was bound by a pre-statehood treaty provision was **"if the contracting parties had power to incorporate it in the treaty of 1863." Id. at 196** (emphasis added).

[18] "The question of implied repeal depends on the relative potency of state police power and the federal interstate commerce power." Johnson at 431. Therefore, even the Bands' suggested issue is determined by balancing the Tenth Amendment's protection of state sovereignty against any valid constitutional basis for a federal grant of immunity from future state law. Under this balancing test, the treaty privilege must give way to the state's regulatory plan because an exemption would require the Court "to pile inference upon inference in a manner that would bid fair to convert Congressional authority under the Commerce Clause to a general police power of the sort retained by the States." United States v. Lopez, 514 U.S. 549, 567 (1995).

that Congress intended to limit Minnesota's sovereignty in 1837 or 1858. Neither the 1837 treaty nor the 1858 Enabling Act contain an express statement that the Chippewa are exempt from state laws for off-reservation hunting or fishing activities. See, New Mexico v. Mescalero Apache Tribe, 462 U.S. at 335, n. 18.

C. Congress Did Not Intend the 1837 Treaty Privilege to be Continuing After Statehood under Ward.

The United States attempts to distinguish Ward by contending that the United States did not know in 1837 whether the 1837 ceded territory would ever be settled (U.S. Brief at pp. 45-46) unlike the circumstances of Ward where "[i]t was understood to be only a matter of time. . ." (U.S. Brief at p. 44). The unrefuted testimony of Historian, D. Hofsommer, is that the settlement patterns were well established by 1837 (JA 1440, 1447) and that, like Ward, it was "simply a matter of time before those [settlement] forces. . .turn around the bend to the present states of Wisconsin and Minnesota. It was just a matter of time" (JA 1440-41). The United States further speculates that the eventual settlement of Minnesota was uncertain because the impetus for the timing of the 1837 land purchase was to obtain access to the pine lands. Yet, the prevailing wisdom of the day was that the "plow follows the axe" (JA 902) meaning that in the 1830s people thought that if the land would grow trees, it would grow crops.[19]

The United States attempts to distinguish Ward by pointing out that Wyoming territory had been organized before the treaty in Ward was ratified (U.S. Brief at p. 45, n. 22). The United States then erroneously contends that the Minnesota portion of the 1837 ceded area did not become a territory until after ratification of the 1837 treaty. When the 1837 treaty was

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[19] The United States' allegation is also counter to the representations made by the Chippewa during the 1837 treaty negotiations that, "you have been told our country is not good to cultivate. It is false. There is no better soil to cultivate than it. . ." (JA 72).

ratified, the entire 1837 ceded territory, including the part now in Minnesota, was part of the Wisconsin Territory which had been formed April 20, 1836 (5 Stat. 10).

The only expert testimony regarding Congress' intent as to the duration of the 1837 privilege repeats President Taylor's proclamation that the privilege was "temporary" (JA 1446; see PA 565).[20]

D. The Treaty Privilege Did Not Constrain Minnesota's Police Powers.

The Bands claim exercise of the treaty privilege will not interfere with Minnesota's sovereignty to a degree sufficient to invoke Tenth Amendment protection because the State can still regulate Band member hunting and fishing for "conservation"[21] purposes under Antoine v. Washington, 420 U.S. 194 (1975), and Tulee v. Washington, 315 U.S. 681 (1942). Antoine was cited to the Court in Klamath for the same proposition advanced here by the Chippewa (Tribe's 1984 Klamath brief at JA 1861). The Klamath decent found Antoine "plac[ed] significant limits on permissible state regulation."[22] Klamath reiterated the rule from Kennedy v. Becker, 241 U.S. at 563-64 that "all those privileged," including the Chippewa here, would be subject to "necessary" and "appropriate" state regulations. Id. Moreover, Antoine is inapplicable because it concerned whether an 1891 agreement ceding a reservation continued to allow Band

[20] The Chippewa claimed they could not be removed "for a considerable time" (St. Croix Brief at p. 8) anticipating that the privilege, even if tied to removal, would end and thus was temporary under Ward.

[21] "Conservation" was defined by the trial court as regulations necessary "to forestall the imminence of extinction." (PA 119); Landowners' Opening Brief, p. 37, n. 38.

[22] "[A] state must demonstrate that its regulation is reasonable and [a] necessary conservation measure. . ." Klamath, 473 U.S. at 780, n. 4 (dissent)(citing, Antoine v. Washington, 420 U.S. at 207, n. 11; and Tulee v. Washington).

members to hunt and fish without following state law, on unallotted, former reservation lands. Id. 420 U.S. at 196. The claims of these Chippewa Bands are not limited to unallotted, former reservation[23] lands, but apply to areas that never were in a reservation.[24]

E. The Implications of the Bands' Arguments Threaten Established Principles of Federalism.

For this Court to affirm it must conclude: (1) in 1837 Congress intended the treaty privilege to function as an "exemption from regulation" (PA 334) outside of Indian Country; (2) Congress intended the Bands' claim to a "regulatory" privilege to be permanent and survive statehood even though there is no plain statement to that effect in the 1837 treaty or Minnesota's 1858 Enabling Act (PA 515); (3) Congress did not exceed its constitutional authority when conveying "its ability to regulate taking of the wildlife" (PA 333) that continued after the 1837 ceded area ceased to be a territory; (4) silence in Minnesota's Enabling Act impliedly abrogated and limited Minnesota's police powers; and (5) such conclusions do not violate the Tenth Amendment and principles of federalism. Because of the implications to federalism that would arise if the lower courts are affirmed, this Court must reverse.

[23] Further, the agreement at issue in Antoine only referred to lands which had retained their tribal character and were never patented to private ownership. See, Antoine, 420 U.S. at 207, n. 11. In the instant case, the Bands claim the ability to go on lands owned by public entities, most of which were at one time patented to private land owners.

[24] Tulee is inapplicable here because in Tulee the Bands argued that by the Yakima treaty "the Indians were given a right in the land. . . ." (LA 8546) which was "a profit a prendre" (LA 8549). The Chippewa claim the 1837 privilege is not an interest in or to land. "[I]t sometimes may be proper to interpret the treaty as conferring a right or privilege which was intended to be subject to state law" (Tulee brief, JA 1844).

IV. THE COURT SHOULD NOT TAKE JUDICIAL NOTICE OF THE MATERIALS LODGED BY THE CHIPPEWA BANDS BECAUSE THEY DO NOT MEET THE REQUIREMENTS OF FED. R. EVID. 201.

The last minute effort of the Chippewa to present a one-sided picture of the treaty harvest's impact in Wisconsin, based upon the materials authored by the Bands and their allies, should not be countenanced. See, 1 McLaughlin, Weinstein's Federal Evidence, 2d Ed., pp. 201-8 to 201-107 (1998). The impact of the treaty harvest was an issue below where substantial evidence was admitted demonstrating that there will be a negative impact on thousands of other citizens as a result of Chippewa treaty harvest of up to fifty percent of the fish and game in this twelve county area. The Bands rely upon a comment of a Wisconsin tourism director in a publication authored by one of the Band's expert witnesses[25] (Bad River Brief, p. 21). The expert testimony of the Landowners' economist concludes, after exhaustive study, that there has been millions of dollars of damage to the tourism industry and property values in Wisconsin as a result of the treaty harvest (Dr. J. Peterson, LA 222). The economist's opinion is that the first year of full treaty harvest in Minnesota will cause damages in excess of 58 million dollars (LA 10948).

"At present, judicial notice is being applied almost exclusively to the findings of physical sciences when the probabilities of accuracy are high." Weinstein, p. 201-99. The lodged materials are not verifiable, are subject to reasonable dispute based on evidence in the record, and are not submitted to support the proposition that in 1837 there was a reasonable

[25] The Bands' Lodging relies heavily upon a book authored by Ronald M. Satz who filed an expert report for the Fond Du Lac Band in the District Court (File No. 5-92-159) dated October 30, 1994 (Plaintiff's Exh. 50 to Fond Du Lac Band's Response to Defendant's Motion for Summary Motion Regarding the 1850 Order and 1837 Treaty).

basis and social need for Congress to immunize Band members from future state hunting and fishing laws.[26]

CONCLUSION

Landowners request that the Court reverse the judgment of the Eighth Circuit.

Respectfully submitted,

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[26] The Brandeis brief in Muller v. Oregon, 208 U.S. 412 (1908) was designed to demonstrate that there was a reasonable basis for legislation limiting the number of hours a woman may labor due to the [then accepted] inherent weaknesses of women as compared to men. Weinstein's Federal Evidence, §201.21[3][b], p. 201-94, 95.